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NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SYNAPSIS, LLC, Plaintiff, v. EVERGREEN DATA SYSTEMS, INC., et al., Defendants.	Case Number C 05-01524 JF ORDER[1] (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; (2) DENYING SYNAPSIS'S MOTION FOR SUMMARY JUDGMENT AS IT PERTAINS TO THE SECOND AMENDED COMPLAINT; AND (3) GRANTING IN PART AND DENYING IN PART SYNAPSIS'S MOTION FOR SUMMARY JUDGMENT AS IT PERTAINS TO THE COUNTERCLAIMS [re. Docket Nos. 207, 209]

Defendants Evergreen Data Systems, Inc. ("Evergreen"), Bruce R. McAllister ("McAllister"), and Steven J. DeMartini ("DeMartini") (collectively "Defendants"), and Plaintiff Synapsis, LLC ("Synapsis") bring cross motions for summary judgment. For the reasons set

[1] This disposition is not designated for publication and may not be cited.

forth below, the Court will (1) grant in part and deny in part Defendants' motion; (2) deny Synapsis' motion as it pertains to the second amended complaint ("SAC"); and (3) grant in part and deny in part Synapsis' motion as it pertains to the counterclaims.

I. BACKGROUND

1. Procedural Background

On January 10, 2005, Synapsis filed the original complaint in the instant action against Evergreen, McAllister, DeMartini, Ireland San Filippo LLP ("ISF"), and Does 1 through 10. On July 13, 2005, this Court issued an order granting the motion of Evergreen, McAllister, and DeMartini to dismiss Synapsis's first five claims, with leave to amend. The dismissed claims alleged: (1) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); (2) breach of contract; (3) intentional interference with prospective economic advantage; (4) negligent interference with prospective economic advantage; and (5) fraud.

On August 10, 2005, Synapsis filed a first amended complaint, alleging: (1) violations of RICO; (2) breach of contract; (3) intentional interference with prospective economic advantage; (4) negligent interference with prospective economic advantage; (5) fraud; and (6) trade libel and slander. Evergreen, McAllister, and DeMartini moved to dismiss the first, third, fourth, and fifth claims. ISF moved to dismiss the second claim, the only claim alleged against it. On January 9, 2006, this Court issued an order granting ISF's motion to dismiss, again with leave to amend. This order also denied in part and granted in part, without leave to amend, the motion to dismiss of Evergreen, McAllister, and DeMartini.

On March 8, 2006, Synapsis filed a second amended complaint ("SAC") alleging (1) breach of contract; (2) fraud; (3) trade libel and slander; and (4) conversion. On March 28, 2006, Evergreen, McAllister, and DeMartini filed an answer to the SAC and asserted counterclaims against Synapsis and William Akel ("Akel"), the former President of Synapsis, for: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) intentional interference with existing contractual relationships; (4) intentional interference with prospective economic

relationships; (5) negligent interference with prospective economic relations; (6) inducing breach of contract; and (7) unfair business practices in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq*. ISF answered the SAC on April 7, 2006 and moved for summary judgment on August 4, 2006.[2] The Court granted this motion on September 12, 2006.

On January 16, 2007, at the request of Evergreen, McAllister, and DeMartini, the Court dismissed the counterclaims against Akel with prejudice. On January 12, 2007, Evergreen, McAllister, and DeMartini moved for summary judgment as to Synapsis's remaining claims, and Synapsis moved for partial summary judgment. The Court heard oral argument on February 16, 2007.

2. Factual Background

Synapsis alleges the following: Synapsis is an electronic forms and laser printing company. On September 21, 1992, Synapsis's predecessor, Synapsis Corporation Ltd., entered into a "Sales Agent Agreement" ("SAA") with Evergreen, a business forms distributor. SAC ¶ 11 and Ex. 1. The SAA appointed Evergreen as Synapsis's "non-exclusive selling representative in the Area and exclusive selling representative for parties listed on Schedule B to actively promote and solicit orders for the Manufacturer Products or any components thereof for the term of this Agreement." SAC Ex. 1. The SAA is signed by Timothy Short ("Short"), the then-President of Evergreen, and Akel. SAC Ex. 1. Synapsis alleges that it "took full control of the duties and responsibilities of" the SAA on or about June 26, 1996, as confirmed by a letter dated April 11, 1996. SAC ¶ 11 and Ex. 2. This letter, addressed to Akel from Short, states that "Evergreen recognizes the intellectual property value of the subject products and written materials and agrees to use them solely within the limitations of the existing marketing agreements between Synapsis and Evergreen." SAC Ex. 2.

In 1998, "the ownership of EVERGREEN changed hands to MCALLISTER and

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[2] ISF filed an amended motion for summary judgment on this date after filing its first motion for summary judgment on May 18, 2006.

DEMARTINI." SAC ¶ 16. Through early 1999, Synapsis and Evergreen "enjoyed a good, working relationship." *Id.* On May 10, 2000, Synapsis, McAllister, and Bruce Evans, an "Evergreen manager," entered into a "Mutual Non-Disclosure Agreement" ("NDA"), that imposed certain restrictions on the recipients of "Confidential Information," including that the "[r]ecipient shall not use the Confidential Information for its own use or for any purpose except to evaluate whether it desires to enter into a business transaction with the Disclosing Party, or as necessary to carry out the terms of such business transaction." SAC ¶ 38 and Ex. 3.

Synapsis alleges that, in late 2002, its "level of business was reduced by more than 60%." SAC ¶ 19. McAllister and DeMartini allegedly stated that the causes of this reduction in business were the "bad times in the economy, 'dot-com' firms going out of business and the reluctance of businesses to spend monies on electronic forms." *Id.* However, Synapsis became suspicious that "something was amiss" when it received a phone call in late October 2002 on the telephone line dedicated to Synapsis-Evergreen business from a customer for whom Synapsis had not created an order. SAC ¶ 20. Synapsis alleges that McAllister, DeMartini, and Evergreen in fact had "entered into other business relationships" in violation of the SAA and were "secretly diverting business from [Synapsis] through an in house technical service center." SAC ¶ 19. Synapsis alleges that it gave "valuable and proprietary trade secret information" to Evergreen in reliance on representations by McAllister and DeMartini that the information would be used to further the business relationship between Evergreen and Synapsis, but that McAllister and DeMartini "used this information to cease doing business with SYNAPSIS while stringing SYNAPSIS along falsely telling SYNAPSIS that business was slow." SAC ¶¶ 28, 30. Synapsis alleges that "EVERGREEN's business was expanding and that EVERGREEN had begun a new relationship with a competitor of SYNAPSIS, using SYNAPSIS' trade secrets and valuable knowledge and training." SAC ¶ 35. Synapsis alleges that "between one to six million dollars that should have belonged to SYNAPSIS per the terms of the [Sales Agent Agreement] were wrongfully diverted." SAC ¶ 21.

Defendants deny many of the factual allegations contained in the SAC and assert numerous affirmative defenses. Defendants allege the following in their counterclaim: Evergreen believes that "the products offered by Synapsis, while functional, simply did not offer customers everything they demanded and needed." Counterclaim ¶ 13. As a consequence of the inadequacy of Synapsis's products, "Evergreen was forced to seek out products that would satisfy their customers' needs with regard to form software. This evolution in the marketplace also resulted in Evergreen developing more enhanced in-house technical capabilities to deal with the more complex and evolving products offered by vendors other than Synapsis." Counterclaim ¶ 15. "On or about October 25, 2004, [Synapsis and Akel] began attempting to solicit business from Evergreen's customers. Some of those solicitations resulted in a loss of customers to Evergreen, and a resulting loss of income." Counterclaim ¶ 19. "[W]ithout complying with the terms of the [SAA], [Synapsis and Akel] unilaterally terminated the [SAA] and refused to honor Evergreen's request for product." Counterclaim ¶ 22. "Evergreen sought to obtain from Synapsis the latter's return of all Evergreen customer data which Synapsis had utilized in connection with the parties' earlier dealings under the [SAA]. Synapsis refused to provide such customer information despite the fact that such data is crucial to Evergreen's ability to provide technical support to those customers." Counterclaim ¶ 23.

II. LEGAL STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party meets this initial burden, the burden shifts to the non-moving party to

present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

"When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'" *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting *Celotex*, 477 U.S. at 325). Once the moving party meets this burden, the nonmoving party may not rest upon mere allegations or denials, but must present evidence sufficient to demonstrate that there is a genuine issue for trial. *Id.*

III. DISCUSSION

1. Defendants' Motion for Summary Judgment

Defendants move for summary judgment on each of the four claims of the SAC. Synapsis opposes each aspect of the motion.

a. First Claim: Breach of Contract

Defendants move for summary judgment on the breach of contract claim as it pertains to the alleged breach of the SAA and the NDA.

i. Breach of the SAA

Synapsis alleges that Defendants breached the SAA by (1) violating an exclusivity provision, *see* SAC ¶ 60; (2) failing to discuss and resolve differences and to use best efforts to market Synapsis's products, *see* SAC ¶ 61; and (3) violating the license, confidentiality, and commissions provisions of the SAA, *see* SAC ¶ 62, 66. For the reasons discussed below, the Court will grant Defendants' motion only as to the first alleged breach.

(1) Alleged Violation of an Exclusivity Provision in the SAA

(a) Statute of Limitations

Defendants argue that Synapsis's claims under the SAA are barred by the applicable statute of limitations. The limitations period for breach of a written contract is four years. Cal. Civ. Code § 337. "[T]he statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1110 (Cal. 1988). "It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it." *Bernson v. Browning-Ferris Industries*, 7 Cal. 4th 926, 931 (Cal. 1994). Defendants contend that Akel was or should have been aware in 2000 of Evergreen's relationship with Formscape, one of Synapsis's competitors, and that a breach of contract action based on this relationship is barred.

Synapsis brought the instant action on January 10, 2005. There is a factual dispute regarding the date upon which Synapsis had notice or should have been on notice of the alleged breaches of the SAA. Synapsis contends that it delayed suit because Defendants misled it into believing that no breach of the SAA had occurred. *See* Opposition to Defendants' Motion 19. Defendants present evidence tending to prove that Akel should have had or did have notice of the alleged breach, but that remains an issue of fact. The Court thus cannot determine as a matter of law that the statute of limitations bars the breach of contract claim.

(b) Waiver and Estoppel

Defendants next contend that Synapsis's breach of contract claim is barred by the doctrines of waiver and estoppel. Defendants assert that Synapsis continued to treat the contracts at issue in this case as viable despite an apparent breach. *See Letter v. Eltinge*, 54 Cal. Rptr. 703, 710-11 (1966) (discussing waiver doctrine); *Trustees of the California State University v. National Collegiate Athletic Association*, 147 Cal. Rptr. 187, 193 (1978) (discussing estoppel doctrine). Synapsis argues that Defendants have not met their burden of proving estoppel and waiver, that Synapsis merely complied with the terms of the SAA, that Synapsis did not know of

the breach because of Defendants' false statements, and because Defendants do not have clean hands. *See e.g. Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1984) (discussing doctrine of unclean hands).

Having reviewed the evidence, the Court concludes that factual issues remain as to Synapsis's knowledge of the alleged breaches of contract, its actions in response to its discovery of the alleged breaches of contract, and Defendants' roles in concealing the breaches of contract from Synapsis. The Court cannot resolve these issues of fact in deciding the instant motion.

(c) The Alleged Exclusivity Provision in the SAA

Synapsis alleges that Defendants breached the exclusivity provision of the SAA by selling LaserForms products through another manufacturer and by expanding its technical service center. *See* FAC ¶ 60. Defendants move for summary judgment on the basis that the SAA does not include such an exclusivity provision.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ. Code § 1636. "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . ." Cal. Civ. Code § 1639. "Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning." *Morey v. Vannucci*, 64 Cal.App.4th 904, 912 (Cal. Ct. App. 1998). "California recognizes the objective theory of contracts, under which [i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation. The parties' undisclosed intent or understanding is irrelevant to contract interpretation." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal.App.4th 944, 956 (Cal. Ct. App. 2003) (internal citations and quotation marks omitted).

The section of the SAA most relevant to the disputed issue of exclusivity is the paragraph entitled "Appointment as Sales Agent." It reads:

> Manufacturer [Synapsis] hereby designates and appoints Agent [Evergreen] as its non-exclusive selling representative in the Area and exclusive selling representative for parties listed on Schedule B to actively promote and solicit orders for the Manufacturer Products or any components thereof for the term of this Agreement. Manufacturer may designate and appoint other selling representatives in the non-exclusive Area, including its own direct sales force, as it deems advisable in its sole discretion. Manufacturer will not, however, attempt to appoint another third-party or interfere with existing relationships which have consummated between Manufacturer and Agent.

SAA ¶ 3. Schedule B does not identify specific parties, but instead defines "Overall Territory" as "[a]ny and all areas of the world where Agent's software developers have customers," and "Specific Installed Customer Bases" as "**Software Developers**, as defined as []a company which creates or exclusively represents programs contained on user loadable media (floppy disk or stored set of instructions) which govern the system operation to meet specific user needs and make the hardware run." SAA Schedule B.

The Court concludes as a matter of law that SAA ¶ 3 does not impose an exclusivity obligation on Evergreen. The language is not ambiguous, nor is it susceptible to an interpretation requiring Evergreen to sell only Synapsis products. By its express terms, SAA ¶ 3 imposes an exclusivity obligation on *Synapsis*, not on Evergreen. The last sentence of the paragraph prohibits *Synapsis* from appointing another third-party, but no comparable sentence prohibits *Evergreen* from selling these products of one of Synapsis's competitors. Nor does Schedule B provide support for an argument that the exclusivity contemplated by the SAA was intended to benefit Synapsis. The absence of named parties does not, as Synapsis suggests, render the terms of the SAA vague as they pertain to exclusivity; at most, it indicates that *Evergreen* may not have been granted meaningful exclusivity.

Nor do other clauses of the SAA impose an exclusivity obligation on Evergreen. The 'best efforts' clause, SAA ¶ 5.1(a) ("Agent shall use its best efforts to market and promote the

sale of the Manufacturer Products throughout the Area."), does not require exclusivity.[3] The listed obligations of Synapsis in SAA ¶ 5.2(d) affirm *Synapsis's* duty to "protect Agent's exclusive rights to supply products to accounts identified on Schedule B," but the SAA imposes no parallel duty on Evergreen.[4] The fact that the agreement imposes limits on Evergreen's use of Synapsis's trademarks and trade names does not establish exclusivity. *See* SAA ¶ 9.2 ("Agent agrees that is shall not use, make reference to or otherwise designate Manufacturer's trademarks or trade names except as they may be used for the benefit of Manufacturer . . . . Manufacturer agrees to allow Agent the right to use its trademark 'LaserForms' for SNAP Retrofit™ electronic forms provided Manufacturer is given credit for production.").

The extrinsic evidence proffered by Synapsis does not show that the SAA is reasonably susceptible to Synapsis's proposed interpretation. The letter sent by Short to Akel on April 11, 1996, *see* Synapsis Motion Ex. 2, does not pertain to exclusivity, but rather to Evergreen's acknowledgment of Synapsis's intellectual property rights in the Evergreen and LaserForms logos. This is made clear in the request sent by Akel on April 10, 1996: "This authorization simply states that Evergreen will recognize the intellectual property value of all items by Synapsis being used, and the used [sic] of any of these materials will be used in conjunction with the agreement in force for doing business." *Id.* The parties may have decided that it was in their business interests to deal with each other exclusively for a period of time, but Synapsis has provided the Court with no evidence indicating that Evergreen understood or believed that it was

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[3] To the extent that Synapsis argues that a 'best efforts' clause implies an exclusivity clause because a 'best efforts' clause has little weight without one, its argument is not supported by the case law. As Evergreen noted at oral argument, an exclusivity clause may give rise to an implied 'best efforts' clause, *see e.g. Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979), but Synapsis has provided the Court with no authority suggesting that the converse is true.

[4] Synapsis describes SAA ¶ 5.1(a) and SAA ¶ 5.2(d) as having "parallel language." Opposition to Defendants' Motion 9. That is not correct. The difference between a "best efforts" clause and a clause that imposes a duty to "protect Agent's exclusive rights" is not insignificant, as Synapsis suggests.

contractually bound to do so. Neither the absence of sales of products by Synapsis's competitors nor internal emails are sufficient to cast doubt on the clear language of the SAA.

The Court concludes that the language of the SAA is unambiguous in its lack of a requirement that Evergreen sell Synapsis's products exclusively. The extrinsic evidence does not suggest any latent ambiguity and does not show that the SAA is reasonably susceptible to the interpretation asserted by Synapsis. Accordingly, the Court will grant Defendants' motion for summary judgment on the breach of contract claim to the extent that it is based upon Evergreen's alleged breach of an exclusivity clause in the SAA.

(2) Alleged Failure to Discuss and Resolve Differences and to Use Best Efforts to Market Synapsis's Products, and Violation of the License, Confidentiality, and Commissions Provisions of the SAA

Synapsis alleges that Evergreen failed "in good faith, to 'discuss and resolve any issues that arise', to 'actively promote and solicit orders for SYNAPSIS' products', and to 'use best efforts to market and promote the sale of SYNAPSIS' products throughout EVERGREEN's territory;'" SAC ¶ 61; that "Evergreen breached the express terms of the [SAA], specifically sections 6.5.c, General License Provisions, 6.6. Confidentiality, and 8.1 Commissions (as orally agreed and implemented by the parties as alleged above), with the intent to cause immediate and irreparable harm to SYNAPSIS;" SAC ¶ 62; and that "Defendants also breached the [SAA] by failing to pay sums to SYNAPSIS due on account of services rendered by SYNAPSIS and received and in use by Oracle customers." SAC ¶ 66. Defendants do not move for summary judgment on the allegations contained in these paragraphs beyond their general argument that the statute of limitations and the doctrines of waiver and estoppel bar these claims.[5] As discussed

[5] Defendants assert that "Evergreen is alleged to have breached the Sales Agreement by selling non-Synapsis products in violation of a purported exclusivity obligation," Defendants Motion 4, and do not discuss the alleged breach of the contract through failure to discuss and resolve differences and to use best efforts to market Synapsis's products except in the context of arguing that the "best efforts" clause is not equivalent to an exclusivity clause. *See id.* at 11-12.

above, factual issues regarding those asserted bars preclude summary judgment.

ii. Breach of the NDA

Defendants assert two bases for summary judgment on the breach of contract claim as it pertains to the NDA. Synapsis responds to one argument and asserts further bases for denying the motion. For the reasons discussed below, the Court concludes that Defendants are entitled to summary judgment on Synapsis's breach of contract claim based on the NDA.

(1) Defendants' Asserted Bases for Summary Judgment

Defendants move for summary judgment on the breach of contract claim to the extent that it is based on any alleged breach of the NDA. Defendants contend that Evergreen was not a party to the NDA and that Synapsis is judicially estopped from claiming otherwise, and that Synapsis cannot establish that McAllister breached the NDA by disclosing any confidential information or that it suffered damage from that disclosure.

(a) Evergreen and the NDA

Synapsis alleges that it and McAllister entered into the NDA on May 10, 2000, and that "[i]n that agreement, MCALLISTER agreed to hold SYNAPSIS' information as confidential and proprietary. The agreement also contained an attorneys' fees clause. At the time that this agreement was executed, MCALLISTER was a partner of ISF and ISF was MCALLISTER's actual or ostensible principal with respect to the agreement." SAC ¶ 59. Evergreen moves for summary judgment, claiming that Synapsis is judicially estopped from arguing that Evergreen was a party to the contract. However, Synapsis has only argued that Evergreen did not sign the NDA, not that it is not a party to it.[6] Its allegation that McAllister was an agent for ISF when signing the NDA does not preclude Synapsis from arguing that McAllister also was an agent for

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[6] Defendants place great weight on Synapsis's statement in opposition to ISF's motion for attorneys' fees that "[a]lso important is that the Non-Disclosure Agreement was not signed by Evergreen, but by McAllister and John Evans. Comparing it to the SAA, which was signed by Evergreen only, it markedly shows the difference." Opposition to ISF Motion for Attorneys' Fees 11. The Court concludes that this statement is an insufficient basis for judicial estoppel.

Evergreen.

Synapsis provides evidence that Evergreen was a party to the NDA in the form of Akel's declaration that he met with McAllister and Evans at his home and discussed business between Evergreen and Synapsis. Akel Decl. ¶ 46-50(a).[7] This evidence raises a reasonable inference that McAllister signed the NDA on behalf of Evergreen.

(b) Evidence that McAllister Breached the NDA by Revealing Information About the "EDGE" Product and Resulting Damages

Defendants argue that Synapsis has produced no evidence indicating that McAllister breached the NDA by revealing confidential information regarding Synapsis's "EDGE" product or that Synapsis suffered any damages from such a disclosure. Indeed, Synapsis's opposition to the motion identifies no evidence of such a disclosure, and it appears that Synapsis has abandoned this theory. Accordingly, the Court will grant summary judgment to Defendants as to any alleged breach of the NDA involving disclosure of confidential information about the "EDGE" product to Oracle.

(2) Other Breaches of the NDA Asserted by Synapsis in Opposition to Defendants' Motion

Based upon their moving papers, Defendants appear to understand Synapsis's claim for breach of the NDA as pertaining solely to the EDGE product discussed at the meeting on May 10, 2000. Synapsis, however, opposes the motion by asserting two alternative theories of breach of the NDA. As discussed below, the Court concludes that neither theory is sufficient to withstand summary judgment.

First, Synapsis asserts that Defendants reverse-engineered the Docuguard product through

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[7] The Akel Declaration is subject to multiple objections by Defendants. However, the objections to these paragraphs are limited and, even if granted, would not change the Court's analysis.

their technical service center. *See* SAC ¶ 63 ("Defendants have breached the confidentiality provisions of [the NDA] by unlawfully appropriating SYNAPSIS' Work, trade secrets, and proprietary and confidential information to compete against SYNAPSIS through the internal technical center."). Defendants asserted at oral argument that they could not have reverse-engineered the Docuguard product as a result of confidential information covered by the NDA because the undisputed evidence shows that they had engineered the product by May 12, 2000, only two days after the NDA was signed. *See e.g.* Synapsis Motion 17 (stating this date). This argument is well-taken. Based on the evidence in the record, no reasonable trier of fact could find that such a complicated undertaking could have been completed in two days. Even if the NDA might have prohibited Defendants from reverse-engineering the Docuguard product going forward, that is not what occurred. Synapsis's breach of contract claim may not proceed on this basis.[8]

Second, Synapsis asserts that Defendants solicited a skilled Synapsis technical employee, Wayne Patterson ("Patterson"), within the two year period covered by the NDA.[9] The evidence

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[8] Synapsis submits declarations of four former Evergreen employees. *See* Decls. of Christine Gabriele, Andee Chin Loudermilk, Irma LeGrande, and Brian Falor. These declarations refer to an alleged effort by Evergreen to increase its revenue by replacing Synapsis in the LaserForms product area and by capturing maintenance contracts that had previously been serviced by Synapsis. It is not clear from the papers filed by Synapsis that these allegations pertain to the alleged breach of the NDA. These allegations do not support Synapsis's apparent original theory that McAllister breached the NDA by revealing information about the EDGE product to Oracle or the apparent new theories that Defendants reverse-engineered the Docuguard product or solicited Patterson's employment. Given their unclear relationship to any of these theories, these declarations are insufficient to create a material issue of triable fact that would allow Synapsis to withstand summary judgment on a claim for breach of the NDA. The Court reaches this conclusion without expressing any opinion as to whether these declarations provide evidence of Synapsis's alleged violation of the best efforts, confidentiality, or licensing provisions of the SAA.

[9] "Without the prior written consent of the Disclosing Party, the Recipient and its representatives will not, for a period of two years after the date of this agreement, solicit or cause to be solicited the employment of any person who is now employed by the Disclosing Party." NDA ¶ 4(a).

submitted by Synapsis tends to prove that John Evans, an Evergreen employee, sent an email to DeMartini and McAllister about his "[n]eed to discuss the hiring of Wayne Patterson as well as new developments at Synapsis," Synapsis Motion Ex. 34, and that Patterson became "part of Evergreen," Synapsis Motion Ex. 50. However, the SAC does not include an allegation regarding Patterson's employment. If Synapsis acquired this information during discovery, it should have moved to amend its complaint. Moreover, Synapsis does not point to evidence that Patterson was in its employ at the time that the NDA was signed, that Defendants' actions amounted to a solicitation of Patterson's employment, or that it suffered any damages from Patterson's asserted employment by Evergreen. Accordingly, the Court concludes that Synapsis may not proceed on its breach of contract claim on this unpled theory.

b. Second Claim: Fraud

Synapsis alleges that Defendants made a series of false statements that they would

> (i) hold SYNAPSIS' proprietary and trade secret information in confidence, (ii) use SYNAPSIS' services exclusively for all sales involving Oracle financial software applications and other Specific Installed Customer Bases, and (iii) use SYNAPSIS' services exclusively for all sales falling within the exclusive parameters of the contract with respect to Software Developers as defined in the contract.

SAC ¶ 70. Synapsis also alleges that

> from in or about 2001 to the present, Defendants MCALLISTER and DEMARTINI orally and in writing represented and warranted to SYNAPSIS and SYNAPSIS' Managing Member, Akel, that the drop in sales was due to 9-11, the economy and other factors external to Defendants' business operations, and that Defendants were complying with all of their contractual obligations.

SAC ¶ 71. Defendants move for summary judgment on the second claim on the basis that Synapsis cannot prevail on either a fraud by deceit or a promissory fraud theory. Synapsis does not identify in its opposition the theory upon which it proceeds,[10] but argues that the alleged

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[10] Synapsis entitles its discussion "Fraud is Available to Synapsis Based on Evidence of Evergreen's Breach of Contract." However, the evidence it provides suggests a theory of fraud in the performance of a contract, which would seem most relevant to a fraud by deceit theory.

breach of the exclusivity provision is evidence of fraud. Because the Court concludes that the SAA does not contain an exclusivity provision, that theory of fraud fails. Synapsis argues that it reasonably relied on misrepresentations by Defendants and that a question of fact exists with regard to such reliance. Because Synapsis's theory of fraud is not clear from its opposition to the motion, the Court will analyze the claim under both theories. As discussed below, the Court concludes that Synapsis has failed to identify a triable issue with respect to either theory and will grant Defendants' motion for summary judgment as to the fraud claim.

i. Fraud by Deceit

Under the Restatement (Second) of Torts and California decisions incorporating that standard,

> [t]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

Lovejoy v. AT&T Corp., 92 Cal.App.4th 85, 96 (Cal. Ct. App. 2001) (citing *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal.App.4th 603, 612-613 (Cal. Ct. App. 1992)). The conduct on which Synapsis bases its fraud claim is described in Akel's declaration and relates to the decline in Evergreen's sales of Synapsis's products:

> McAllister and DeMartini continued to make excuses to [him] for the lack of business, including bad times in the economy, the "dot.com" firms were going out of business, and the reluctance of business to spend monies on electronic forms. They particularly emphasized the September 11 events as a main cause. During this time, Synapsis business with Evergreen was down more than 60%.

Akel Decl. ¶ 53.[11] Evidence that Defendants attempted to "upgrade" businesses from Synapsis

[11] Defendants object to another, unquoted sentence of this paragraph. The Court does not consider that sentence in resolving this aspect of the motion and expresses no opinion as to the objection.

products and services to products provided by themselves and other vendors, *see e.g.* Synapsis Motion Ex. 57, does support an inference that Defendants may have intended to cause Synapsis to act in such a way that would allow Defendants to gain a competitive advantage over Synapsis. However, Synapsis does not tie any specific misrepresentation or concealed fact to Defendants' obligations under either the SAA or the NDA. Synapsis argues that Defendants concealed facts material to the exclusivity provision, but the Court has concluded that no such provision existed in the SAA. Synapsis fails to identify any other duty owed by Evergreen to reveal the information that it alleges that Evergreen concealed.

ii. Promissory Fraud

"Promissory fraud is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." *Lazar v. Superior Court*, 909 P.2d 981, 985 (Cal. 1996). For the reasons discussed previously, Synapsis may not base a promissory fraud claim on the alleged exclusivity clause in the SAA. Synapsis fails to identify any evidence that tends to prove that Defendants promised to hold Synapsis's proprietary and trade secret information in confidence without the intention to do so, or that Defendants intended to breach other clauses of the NDA or the SAA when they entered those agreements.

c. Third Claim: Trade Libel and Slander

Defendants next contend that Synapsis cannot prevail on its trade libel claim because Synapsis cannot identify a defamatory statement made by Defendants that is provably false. Synapsis opposes the motion on the basis that the following statement, made by Evergreen, is an untrue statement of fact and is libelous *per se*:[12]

> For many years Evergreen has used a third party to provide fulfillment and technical support for the following products:

[12] In its opposition, Synapsis refers the Court to the arguments it makes in its own motion for partial summary judgment. The Court has considered those arguments.

> • **LaserForms** (printer installed SIMM/DIMM based product)
> • **DocuGuard** (memory chip in a device external to the printer)
> While these products have served the purpose well for a number of years, the technology has now reached the age where it has become dated and no longer adequately serves the needs of our clients.
> **Effective immediately Evergreen will no longer use this third party for support or new projects for existing installations of the products mentioned above.**
> . . .
> As an upgrade path for customers that require greatly expanded functionality, **Evergreen will offer a trade-in consideration of a 50% discount from software and services on the much more advance LaserForms.Deluxe.** This product has [] capabilities not available on the product you are currently using[.]
> . . .
> You may be contacted by this third party firm with offers of discounts in exchange for doing business directly with them. This company has only very limited technical resources and may not be able to give you the support you have come to expect from Evergreen.

Defendants' Motion Ex. H (letter dated Oct. 29, 2004) (emphasis in original); *see* SAC ¶ 79.

"The Restatement Second of Torts, has described the tort of 'trade libel' as '[t]he particular form of injurious falsehood that involves disparagement of quality . . . .' It is there defined as 'the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property.' California has adopted the Restatement formulation." *Leonardini v. Shell Oil Co.*, 216 Cal.App.3d 547, 572 (Cal. Ct. App. 1989) (internal citations omitted). To constitute trade libel, a statement must be false, but need not be malicious except in the sense that it was not privileged. *Id.*[13] "In most cases, whether a statement is fact or opinion is a question of law. To decide

[13] Synapsis uses the terms trade libel and defamation without drawing any distinction between them. "[D]espite the fact that what has come to be known as 'trade libel' is similar to defamation in that both involve the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff, the two torts are distinct; that is, 'trade libel' is not true libel and is not actionable as defamation." *Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 549 (Cal. Ct. App. 1989). However, this difference is immaterial to the instant motion because Synapsis's inability to identify a provably false statement precludes it from bringing either of these claims.

whether a statement is fact or opinion, a court must put itself in the place of an average reader and determine the natural and probable effect of the statement, considering both the language and the context." *ComputerXpress, Inc. v. Jackson*, 93 Cal.App.4th 993, 1011 (Cal. Ct. App. 2001) (internal citations omitted). "[W]here a statement is ambiguous and capable of being understood by the average reader as being either fact or opinion, categorization of the statement is not a question of law and must be left to the jury's determination." *Hofmann Co. v. E. I. Du Pont De Nemours & Co.*, 202 Cal.App.3d 390, 397-98 (Cal. Ct. App. 1988) (*see also Kahn v. Bower*, 232 Cal.App.3d 1599, 1608 (Cal. Ct. App. 1991) ("[I]t is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact. If that question is answered in the affirmative, the jury may be called upon to determine whether such an interpretation was in fact conveyed.").

The Court concludes that the challenged statements are not reasonably susceptible of an interpretation that implies a provably false assertion of actual fact. The statement that "the technology has now reached the age where it has become dated and no longer adequately serves the needs of our clients" communicates Evergreen's assessment of the technology and the needs of the clients. As such, it is an opinion. The statement that the new product "has [] capabilities not available on the [Synapsis] product you are currently using" well may be a provably false statement of fact, but Synapsis has provided the Court with no evidence in this regard and does not argue that the statement is in fact false. The statement that Synapsis has "only very limited technical resources" is an expression of Evergreen's opinion of the contrast between itself and Synapsis. This is particularly apparent when the statement is considered in conjunction with the second clause of the statement, which is that Synapsis "may not be able to give you the support you have come to expect from Evergreen." Taken as a whole, that sentence expresses an opinion of the likelihood of inadequate support, not a provably false statement of material fact.

Nor do the materials that Synapsis cites in its own motion contain a provably false statement of material fact. In an email dated December 2, 2004, John Evans wrote:

> Please be careful not to say the product is being sunsetted. Synapsis will assure them it's not the case and will probably accuse us of misrepresenting the truth. We need to tell customers that the products [sic] is obsolete and they we have a much more reasonably priced alternative that will offer much more functionality.

Synapsis Motion Ex. 56. This email tends to prove that Evergreen avoided provably false statements and instead expressed its opinion that the products were obsolete and could be replaced by better Evergreen products. Synapsis claims that Evergreen stated that Synapsis could not support its own products. However, the cited email dated December 17, 2004 states that Evergreen, not Synapsis, no longer supports the LaserForms.Plus product. *See* Synapsis Motion Ex. 57.

Because Synapsis has not alleged a provably false statement, the Court will grant Defendants' motion for summary judgment as it pertains to the third claim for trade libel and slander.

d. Fourth Claim: Conversion

Synapsis alleges that Evergreen used software code that it had developed for Oracle "to SNAP Retrofit customers [] under the LaserForms and DocuGuard brand." SAC ¶ 85. Defendants move for summary judgment on the bases that Synapsis has failed to present any evidence of a conversion and that the conversion claim is preempted by the Copyright Act, 17 U.S.C. § 101 *et seq*.

The parties dispute the significance of the relevant allegations in the SAC, which read:

> 83. At all relevant times, SYNAPSIS was the owner of computer software code that was incorporated into the Oracle Financials software through an arrangement between SYNAPSIS and Oracle. (Oracle is a software developer as defined in the agreement between EVERGREEN and SYNAPSIS.) This software code was designed and tested by SYNAPSIS with Oracle and enhanced the Oracle Financials software for forms and check printing. SYNAPSIS received an economic benefit from this arrangement with Oracle through EVERGREEN because this allowed SYNAPSIS to provide transparent services through the Oracle Financials software. Oracle received an economic benefit because it helped satisfy customer needs.
> 84. EVERGREEN had no permission to use this software code without SYNAPSIS' permission.
> 85. As alleged above, EVERGREEN used this software code with respect to SNAP Retrofit customers sold under the LaserForms and DocuGuard brand that

> EVERGREEN sold electronic forms and cut sheet preprinted laser forms to that was covered by the contract between EVERGREEN and SYNAPSIS. This use was without the permission of SYNAPSIS.

SAC ¶¶ 83-85. The ambiguity in these paragraphs stems from the word "used" in SAC ¶ 85. The Defendants construe it as meaning copying or incorporating in such a way that would bring this claim within the preemptive scope of the Copyright Act. *See* Defendants' Motion 22-24; Reply 9-11. Synapsis construes it as meaning that "Evergreen was selling Synapsis property embedded in the Oracle Financials software outside of Synapsis. They also did not inform Synapsis that they were working on, and eventually succeeded in creating their own DocuGuard (i.e. Laser Forms) solution or the fact that they were having meetings with Oracle to 'sell' Oracle the 2nd part (back end) of the 1st part (front end) solution Oracle and Synapsis worked on together." Akel Decl. ¶ 4.[14]

"Section 301 of the Copyright Act establishes a two-part test for preemption. First, the [work] must come within the subject matter of copyright as defined in Sections 102 and 103 of the Copyright Act. Second, the rights granted under state law must be equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 [of the Copyright Act]." *Del Madera Prop. v. Rhodes and Gardner Inc.*, 820 F.2d 973, 976 (9th Cir.1997) (overruled on other grounds) (internal citations and quotation marks omitted). Synapsis argues that Defendants could not have copied Synapsis's code, as the code was embedded within Oracle Financials, a fact, it contends, that takes Synapsis's claim outside the preemptive scope of the Copyright Act. *See* Opposition to Defendants' Motion 24. However, Synapsis provides no authority for this contention. Synapsis also provides no reasonable explanation of how the undefined "use" of its property is not equivalent to the copying of its code. The primary question before the Court is the meaning of Synapsis's pleading. This

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[14] This declaration is subject to objection by Defendants. The Court need not resolve this objection, however, since it will grant the motion with respect to this claim even having considered the declaration.

ambiguity does not create a triable issue of fact. Instead, because Synapsis has not explained adequately how "use" differs from a copying of code that would fall within the scope of the Copyright Act, the Court concludes that the conversion claim is preempted.

2. Plaintiff's Motion for Partial Summary Judgment

a. Motion for Summary Judgment as to the SAC

i. First Claim: Breach of Contract

(1) Alleged Breach of the SAA

Synapsis moves for summary judgment on the breach of contract claim on the question of exclusivity that, as discussed above, the Court has resolved against Synapsis. Synapsis also appears to move for summary judgment on the breach of contract claim as it pertains to Defendants' alleged failure to discuss and resolve differences and to use best efforts to market Synapsis's products, *see* SAC ¶ 61; and Defendants' alleged violation of the license, confidentiality, and commissions provisions of the SAA, *see* SAC ¶ 62, 66. However, Synapsis has not met is burden of identifying the basis of such a motion and demonstrating the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 322. Accordingly, the Court will deny all aspects of Synapsis's motion for summary judgment on its claim for breach of the SAA.

(2) Alleged Breach of the NDA

As discussed above, the Court will grant Defendants' motion for summary judgment on the breach of contract claim as it pertains to the NDA. While it is not clear from its moving papers, Synapsis also appears to move for summary judgment on its breach of contract claim as it pertains to the NDA. To the extent that Synapsis makes such a motion, it will be denied.

ii. Third and Fourth Claims: Trade Libel and Slander, and Conversion

As discussed above, the Court will grant Defendants' motion for summary judgment as to the third and fourth claims of the SAC. Accordingly, the Court will deny Synapsis's motion for summary judgment as to these claims.

b. Motion for Summary Judgment as to the Cross-Complaint

i. Standing of McAllister and DeMartini

Synapsis contends that McAllister and DeMartini do not have standing to bring counterclaims based on the SAA because they were not parties to that agreement. In opposition, Defendants contend that Synapsis is judicially estopped from making such an argument because it has brought suit against McAllister and DeMartini for breach of contract. In reply, Synapsis asserts that it has not brought a breach of contract claim against DeMartini and that it asserts a breach of contract claim against McAllister only as to the NDA. While the SAC is somewhat confusing and does not draw a neat distinction between claims brought for breach of the NDA and the SAA, the Court concludes that Synapsis is correct in stating that it brings a breach of contract claim against McAllister individually only for breach of the NDA. The claim excludes DeMartini in its header. *See* SAC 15. Accordingly, Synapsis is not judicially estopped from asserting that McAllister and DeMartini do not have standing to bring counterclaims based on the SAA. The Court concludes that this argument is well taken and will grant summary judgment in favor of Synapsis on the counterclaim to the extent that it is brought by McAllister and DeMartini on the basis of an alleged breach of the SAA. As a corollary to this conclusion, Synapsis may not proceed on its breach of contract claim against McAllister or DeMartini on a theory that is based on the SAA.

Synapsis also argues that McAllister and DeMartini lack standing to bring any of their remaining counterclaims. Having reviewed the counterclaims, the Court concludes that the injuries asserted therein all pertain to Evergreen and not to its owners, McAllister and DeMartini. The third and fourth counterclaims refer solely to damage suffered by Evergreen. The fifth, sixth, and seventh counterclaims refer to damages to all the Defendants, but those counterclaims focus on the SAA and Evergreen's economic relationships and prospects; they do not identify any personal stake that McAllister and DeMartini had in the challenged transactions. The Court thus concludes that McAllister and DeMartini lack standing to bring the remaining counterclaims

and will grant summary judgment in favor of Synapsis as to this part of its motion as well.[15]

ii. First and Second Counterclaims: Breach of Contract and the Covenant of Good Faith and Fair Dealing

Evergreen claims that Synapsis breached the SAA by failing to give thirty days's notice of termination of the SAA and the opportunity to cure. Synapsis moves for summary judgment on the first and second counterclaims[16] on the basis that it performed all work for which it was paid, that it followed all contractual procedures for terminating the contract, and that Defendants have provided no evidence of damages. Synapsis Motion 25. Akel's testimony that he did not see a written notice of termination, *see* Opposition to Synapsis Motion Ex. B 188:17-24, and the apparent absence of any other evidence of proper termination indicates that there is at least a factual issue as to whether Synapsis terminated the SAA properly. However, the Court also concludes that Defendants have failed to identify any evidence of damages resulting from Synapsis's alleged breach of contract and the implied covenant of good faith and fair dealing. Defendants do not discuss damages in their opposition, and the Court perceives no evidence thereof in the record. Accordingly, the Court will grant summary judgment in favor of Synapsis as to the first and second counterclaims.

iii. Counterclaims Three Through Six: Interference with Economic Advantage

Defendants allege in their third through sixth counterclaims that Synapsis intentionally interfered with their existing contractual relationships, intentionally interfered with prospective economic relationships, negligently interfered with prospective economic relations, and induced

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[15] Because the Court concludes that McAllister and DeMartini are entitled to summary judgment as to all claims against them and that they do not have standing to bring the counterclaims, they no longer will be parties to this litigation.

[16] Synapsis asserts in its motion that the breach of contract claim "is the same thing" as the counterclaim for breach of the implied covenant of good faith and fair dealing. The Court concludes that any differences among the two claims are immaterial given the absence of evidence of damages for any of these claims.

breach of contract. These claims arise from Synapsis's alleged efforts to persuade entities that had a contractual relationship with Evergreen, but not with Synapsis, to breach their agreements with Evergreen. Synapsis moves for summary judgment on these counterclaims on the bases that (1) the customers at issue belonged to Synapsis; (2) Synapsis had a contractual relationship with the customers; (3) Defendants have not satisfied the elements of the relevant causes of action; (4) the negligence claim fails because Synapsis did not owe Evergreen an independent duty of care; and (5) there is no legal distinction between these claims and those brought by Synapsis that the Court dismissed in an earlier order. For the reasons discussed below, the Court will deny this aspect of the motion.

(1) Assertion that Customers at Issue Belonged to Synapsis

Synapsis does not identify any term within the SAA that would allow the Court to conclude that, as a matter of law, the customers at issue in these claims belonged to Synapsis. The SAA may have been an agreement to sell Synapsis's products, but that does not resolve the issue. Instead, a triable issue of fact exists as to the identity of these customers and their relationship, if any, with Synapsis.

(2) Assertion of Contractual Relationship with Customers

Synapsis contends that it is not a stranger to the contracts at issue here and that it therefore cannot be liable for interference. However, a triable issue of fact exists as to whether Synapsis contacted customers of Evergreen that had never purchased Synapsis products or otherwise entered a contract with Synapsis. *See* McAllister Decl. (Vol. II) ¶¶ 14-15, Opposition to Synapsis Motion Ex. J.[17]

(3) Elements of the Causes of Action

Synapsis argues that Evergreen cannot meet the elements of an interference cause of action because Synapsis did not know the identity of the Evergreen customers with whom it allegedly interfered. That is a factual issue for trial. Nor does *Delepenna v. Toyota Motor Sales*,

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[17] These paragraphs are quoted below in the discussion of the seventh counterclaim.

11 Cal. 4th 376 (1995) bar the instant action, because there is a factual issue as to whether Synapsis contacted Evergreen's customers not as a "mere competitor" but in an effort to persuade them to breach their contracts with Evergreen.

(4) Negligence Claim and Duty of Care

Synapsis contends that the claim for negligent interference with prospective economic relationships "is not viable because Synapsis did not owe Evergreen an independent duty of care."[18] The relationships at issue are those to which Synapsis was not a party. Synapsis had a duty of care not to interfere with those relationships. *See e.g.* 40 Cal. Jur. 3d Interference with Economic Advantage § 8. A factual issue remains as to whether Synapsis interfered with those relationships, whether by negligence or intentionally.

(5) The Court's Prior Orders

Synapsis does not identify the language in the Court's prior orders that it believes governs the disposition of these four counterclaims. On July 13, 2005, the Court stated that "Synapsis appears to allege that McAllister and DeMartini intentionally and negligently interfered with the 'existing contractual relationship' between 'Plaintiff and Defendants.'" July 13, 2005 Order 5. The Court explained that "McAllister and DeMartini were Evergreen's corporate agents for purposes of the [SAA] and thus cannot be held liable for interfering with the agreement by inducing its breach." *Id.* at 6. On January 9, 2006, the Court dismissed the claim without leave to amend, finding that Synapsis had not cured this defect. January 9, 2006 Order 9. As discussed above, Evergreen does not allege that Synapsis's agents interfered with the SAA, so these prior orders are not relevant to the Court's analysis.

iv. Seventh Counterclaim: Unfair Competition

Defendants allege that Synapsis engaged in unfair competition by breaching the SAA and its implied covenant of good faith and fair dealing, improperly obtaining and retaining Evergreen's customer information, and improperly seeking to divert business away from

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[18] Defendants do not respond to this specific contention.

Evergreen. Synapsis moves for summary judgment on the basis that Evergreen may seek only restitution pursuant to this claim and that Evergreen has presented no evidence indicating that Synapsis benefitted economically from any action that would give rise to restitution. McAllister declares:

> 14. I learned, in or about 2004, that Synapsis had contacted some of Evergreen's customers in an effort to lure them away from Evergreen. It is my understanding, based on who these customers were, that Evergreen had never sold them Synapsis' products. As such, they were not Synapsis's customers even under plaintiff's mistaken belief [sic] any customer to whom Evergreen sold a Synapsis product was, *de facto*, a Synapsis customer.
>
> 15. It's my understanding and belief, based on my knowledge of Evergreen's sales, that Evergreen lost at least $60,000[19] in business to customers who stopped doing business with Evergreen based [sic] the solicitations they received from Synapsis in or about 2004.

McAllister Decl. (Vol. II) ¶ 15, Opposition to Synapsis Motion Ex. J. This sworn declaration creates a triable issue of material fact as to whether Synapsis improperly diverted business away from Evergreen and as to whether Synapsis benefitted economically from that action. Accordingly, the Court will deny Synapsis's motion for summary judgment as it pertains to the seventh counterclaim. However, because Synapsis's motion is well taken as to the counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing, Evergreen may not base its seventh counterclaim on such alleged breaches.

IV. ORDER

Good cause therefore appearing, IT IS HEREBY ORDERED that:

1. Defendants' motion for summary judgment as to the SAC is GRANTED in part and DENIED in part.
2. Synapsis's motion for summary judgment as to the SAC is DENIED.
3. Synapsis's motion for summary judgment as to the counterclaims is GRANTED

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[19] Synapsis objects to this figure on the basis that it is anecdotal and lacks foundation. The Court will overrule the objection because it concludes that McAllister is well positioned to have personal knowledge of the sales of his company and the effect of the dispute with Synapsis.

in part and DENIED in part.[20]

DATED: March 9, 2007.

JEREMY FOGEL
United States District Judge

[20] The following claims remain for trial:

1. Synapsis's claims against Defendants:
   a. Synapsis may proceed against Evergreen on a breach of contract claim premised on the alleged breach of the best efforts, licensing, confidentiality, and commissions clauses contained in the SAA, but not on the basis of a purported exclusivity clause.
   b. Synapsis may not proceed on any other claim.
2. Defendants' counterclaims against Synapsis:
   a. McAllister and DeMartini may not proceed on any of the counterclaims.
   b. Evergreen may proceed against Synapsis on its third, fourth, fifth, sixth, and seventh counterclaims.

This Order has been served upon the following persons:

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